Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THOMAS ROBERSON, III.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DeGUERIN AND DICKSON
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Counsel for Petitioner

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1988

QUESTIONS PRESENTED

1. **WHETHER A WAIVER OF THE RIGHT TO APPEAL A SENTENCE WHICH PRECLUDES THE APPEAL OF ANYTHING BUT AN "UPWARD DEPARTURE" WAIVES THE APPEAL OF AN ILLEGAL SENTENCE.**

2. **WHETHERTHE FIFTH CIRCUITS ORDER DISMISSING PETITIONER'S APPEAL IS IN CONFLICT WITH UNITED STATES v. ROSA, 123 F 3d. 94 (2nd CiR. 1997).**

3. **WHETHER THE WAIVER OF APPEAL PROVISION CONTAINED IN PETITIONERS PLEA AGREEMENT IS AN UNENFORCEABLE CONTRACT AND VOID AGAINST PUBLIC POLICY.**

LIST OF ALL PARTIES

1. Thomas Roberson, III

2. Chris Flood

3. United States of America

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STATUTES

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JURISDICTION

The order of the Court below dismissing Petitioner's Appeal was entered August 25, 1997. (Appendix A). This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgement on petition for certiorari rests upon 28 U.S.C. §1254(1) and Supreme Court Rule 10.

STATEMENT OF THE CASE

Petitioner was charged with Counts One, Three and Four of a five count Superseding Indictment with conspiracy to possess with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §846, possessing with intent to distribute cocaine base on or about December 10, 1994, in violation of Title 21 §841(a)(1), and with possessing with intent to distribute on or about June 13, 1995, cocaine base in violation of Title 21 U.S.C. §841(a)(1). (I R. 137-141).

Petitioner pled guilty to Count Four of the Superseding Indictment on March 27, 1996, and the United States dismissed Counts One and Three after sentencing. (V R. 3-50).

On October 10, 1996, Petitioner was sentenced to 188 months in the custody of the Bureau of Prisons and a fine of $25,000.00. The District Court illegally increased petitioner's offense level by four points for being an organizer, leader pursuant toU.S.S.G. §3B1.1 and an additional two levels for a co-conspirators possession of a dangerous weapon pursuant to U.S.S.G. §5K2.6.

Petitioner thereafter timely filed notice of appeal on October 16, 1996. (II R. 268-269).

On July 8, 1997 Respondent filed a Motion to Dismiss Petitioner's appeal claiming Petitioner had waived his right to appeal.

On July 21, 1997 Petitioner filed a Response to Respondent's Motion to Dismiss.

Petitioner's appeal was dismissed on August 25, 1997. (Attachment A)

ARGUMENT

A. PETITIONERS HAS THE RIGHT TO APPEAL HIS SENTENCE BECAUSE HIS ILLEGAL SENTENCE WAS IN EFFECT AN UPWARD DEPARTURE.

Petitioner's plea agreement states in pertinent part:

> Defendant is aware that his sentence will be imposed in conformity with the Federal Sentencing Guidelines and Policy Statements... By entering into this agreement, Defendant voluntarily and knowingly waives his right to contest his sentence in any post-conviction proceeding, including but not limited to any appeal right conferred by 18 U.S.C. §3742 or to a proceeding pursuant to 28 U.S.C. §2255, provided, however, that this waiver does not extend to his right to appeal any upward departure pursuant to U.S.S.G. §5K2.0 from the Guideline range found by the district court, to his right to appeal a failure of the Court to grant the United States' motion for downward departure, or to his right to challenge his sentence to the extent that it is the result of a violation of his constitutional rights based on claims of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension.

The right of an accused to appeal is a statutory not Constitutional right. *Abney v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038, 52 L.Ed.2d 651 (1977). The right to appeal a criminal

sentence is conferred by 18 U.S.C. § 3742. This right may be waived if done knowingly, voluntarily and intelligently. *United States v. Zink*, 107 F.3d 716, 717 (9th Cir. 1997); *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993), *cert denied*, -- U.S. --, 115 S.Ct. 652, 130 L.Ed.2d 556 (1994); *United States v. Rutan*, 956 F.2d 827 (8th Cir. 1992); *United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990). When these conditions are met and the appeal waiver is signed it will be binding. *United States v. Price*, 95 F.3d 364, 369 (5th Cir. 1996). However, the waiver must be construed against the government. *United States v. Somner* No. 96-20989, (5th Cr. October 28,1997), citing *United States v. Rosa*, 123 F.3d 94 (2nd Cir. 1997) citing *United States v. Ready*, 83 F.3d 551, 556 (2nd Cir. 1996).

Because the waiver must be construed against the government, the attempt by the government to limit Petitioner's appeal rights to a "formal" "upward departure" must fail. The Fifth Circuit in *United States v. Kelly*, 974 F.2d 22 (5th Cir. 1992) refused to enforce a waiver provision in a similar case where the defendant had waived everything but an "upward departure." In *Kelly* the Fifth Circuit concluded that the trial court illegally sentenced defendant to a greater supervisory release term than statutorily allowed resulting in "some form of 'upward departure.'" *Kelly*, 974 F.2d at 24. Here we have a very similar situation where the District Court's six level increase above the appropriate guideline range amounted to "some form of 'upward departure.'" The Fifth Circuit panel should have followed the holding in *Kelly* and not bound Petitioner to his waiver of appeal. Petitioner's right to appeal cannot rest solely upon whether the sentencing court uses the magic words "upward departure." The Second Circuit in *Rosa* took this argument to its logical conclusion:

> A sentencing court could, in theory, sentence to a life term [or simply beyond the statutory maximum] a defendant who had signed a plea which anticipated only a few months of imprisonment, and that defendant, under the terms of this agreement, would have no right

to appeal even if the sentence were made erroneously. 123 F.3d at 100.

B. THE DISMISSAL OF PETITIONER'S APPEAL IS IN CONFLICT WITH UNITED STATES v. ROSA, 123 F3D. 94 (2ND CIR. 1997) BECAUSE PRTITIONERS WAIVER OF HIS RIGHT TO APPEAL HIS WAS NOT DONE KNOWINGLY AND INTELLIGENTLY.

As was mentioned above a plea agreement waiver of a right to appeal must be made voluntarily, and intelligently. *Zink*, 107 F.3d at 717. Some courts question whether a plea sentence waiver of appeal rights can be made with knowledge or intelligence at all. As District Judge Parker stated in his concurrence in *United States v. Melancon*,:

> I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a "waiver" is inherently uninformed and unintelligent. 972 F.2d 566, 571 (5th Cir. 1992).

The Second Circuit has particular concern in the "unusual" plea agreement entered into by Petitioner where there is no agreed upon sentencing range. The Second Circuit in *Rosa* stated:

> The standard agreement allows him [Petitioner], in advance, to evaluate the predicted range and assess in an informed manner whether he is willing to accept the risk that he will receive a sentence in the upper part of the range and be unable to appeal. There is a direct connection between the predicted range and the right to appeal. Under the unusual agreement drafted by the United States Attorney for the Eastern District, however, the defendant assumes a virtually unbounded

> risk of error or abuse by the sentencing court. He is not able to rely upon the predicted range for any guaranteed point at which his right to appeal will be retained. 123 F.3d at 99.

The Second Circuit found this of particular concern when viewed in light of the "relevant conduct" provision in the Sentencing Guidelines as well as the ability of a defendant to be sentenced to more time for the actions of a co-defendant which is precisely what happened to Petitioner. Petitioner did not knowingly and voluntarily waive his right to appeal because he did not know enough about his sentence to do so.

C. THE APPEAL WAIVER IN PETITIONERS PLEA AGREEMENT IS AN UNENFORCEABLE CONTRACT AND VOID AGAINST PUBLIC POLICY.

Plea agreements should be analyzed and enforced using the principles of contract law. *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995). However plea agreement contracts should be analyzed keeping in mind "special due process concerns for fairness and the adequacy of procedural safeguards." *Ready*, 82 F.3d at 558 *citing*, *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir. 1992). Petitioner's agreement says that his sentence will be imposed "in conformity with the...Guidelines" and then it takes away his right to appeal if it is not. In this case the United States breached the terms of the contract by the District Court not sentencing Petitioner in conformity with the Guidelines, and now, the Fifth Circuit Panel has said that he has no right to appeal such a breach. Surely this type of contract analysis cannot meet the test of "special due process concerns for fairness." It is anything but fair to enforce this contract against Petitioner because not only was he in a bad bargaining position but the length of the sentence was unknown and according to the terms he had no remedy in the event of a breach.

Petitioner's waiver of his appeal in his plea agreement is void as against public policy. In *Rosa* the Second Circuit said it would not restrict parties' ability to enter into plea agreements so long as the agreement does not result in a "serious detriment to important public or private interest..." *Rosa*, 123 F.3d at 97. The enforcement of the appeal waiver in Petitioner's plea agreement would result in a "serious detriment" not only to Petitioner's private interest in freedom but also to the public interest in fair and accurate sentencing.

CONCLUSION

The Order dismissing Petitioner's Appeal was improper. It is an important question of Federal law when, and to what extent, a plea agreement waiver of appeal will be upheld. The petition should be granted.

Respectfully submitted,

DeGUERIN & DICKSON

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT

No. 96-50895

U.S. COURT OF APPEALS
FILED
AUG 25 1997
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.

THOMAS ROBERSON, III
Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas, Austin

Before HIGGINBOTHAM, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss theappeal is GRANTED.

IT IS FURTHER ORDERED that appellee's motion for an extension of time to and including 14 days after the court's ruling on the motion to dismiss, in the event same denied, is DENIED as moot.

MOT-21

[Petitioner's copy was received without a second page]

APPENDIX "B"
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DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
UNITED STATES OF AMERICA

v.

CRIMINAL NO.
A-95-CR-098(1)
(JN THOMAS ROBERSON, JR.)

PLEA AGREEMENT

Defendant will plead guilty to Count Four of the Superseding Indictment.

After sentencing, the United States will dismiss Counts One, Two, Three, and Five of the Superseding Indictment, as to this defendant.

The United States will not institute any further criminal charges against Defendant concerning conduct which is the subject of this investigation.

Defendant will give a complete and truthful statement to law enforcement authorities concerning his knowledge of drug trafficking. Any subsequent prosecutions against

Defendant by the United States shall not be based upon statements or testimony of Defendant which is derived from this agreement except that statements of Defendant and evidence derived therefrom may be used in cross-examination, in rebuttal in any proceeding, or for the prosecution of Defendant for perjury, making false statements, or obstruction of justice. Section 1B1.8 of the Sentencing Guidelines will apply. Information provided by Defendant will not be used to increase the guideline range.

If Defendant testifies in the trial of this cause, the United States Attorney will file a motion recommending a downward departure of three levels. If this case is resolved without a trial, the United States Attorney will make such a motion for a downward departure of three levels. If this case goes to trial and Defendant is ready and wiling to testify but is not called by the United States, the United States Attorney will still move for a downward departure of three levels. Defendant further understands that, in the event the United States files a motion for a departure, the Court will determine the merits of the motion; the Court is not bound by such a motion and may overrule it. If the Court grants a motion for downward departure, the extent of the departure is exclusively in the discretion of the Court.

The United States Attorney represents to the Court that Defendant timely provided complete information to the government concerning his own involvement in the offense and timely notified the United States Attorney of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

Defendant is aware that his sentence will be imposed in conformity with the Federal Sentencing Guidelines and Policy Statements, may be up to the maximum allowed by statute for his offense, and is not subject to parole. By entering into this agreement, Defendant voluntarily and knowingly waives his right to contest his sentence in any post-conviction proceeding, including but not limited to any appeal right conferred by 18 U.S.C. § 3742 or to a proceeding pursuant to 28 U.S.C. § 2255, provided, however, that this waiver does not extend to his right to appeal any upward departure pursuant to U.S.S.G. § 5K2.0 from the Guideline range found by the district court, to his right to appeal a failure of the Court to grant the United States' motion for downward departure, or to his right to challenge his sentence to the extent that it is the result of a violation of his constitutional rights based on claims of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension.

Defendant has tendered $50.00 to the United States Attorney for payment of the mandatory special assessment.

There are no other terms or conditions of this plea agreement.

JAMES H. DeATLEY
UNITED STATES ATTORNEY

By:[sig]
KELLY LOVING
Assistant U.S. Attorney

[sig]
THOMAS ROBERSONDate: 2/16/96
Defendant

[sig]
CHRIS FLOODDate: 2-16-96
Attorney for Defendant